

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act of 1984)	MB Docket No. 05-311
as amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF LEIBOWITZ & ASSOCIATES, P.A.

These Comments are filed by the Law Firm of Leibowitz & Associates, P.A. (hereinafter referred to as the “Firm”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).¹ The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive Franchise.”²

The Firm has represented over fifty Local Franchising Authorities (“LFAs”) over the past twenty-five years, and none of these LFAs have unreasonably refused to award or deny additional competitive cable Franchises. In fact, most of the communities the Firm has represented have encouraged and sought additional competitive cable providers, since competition promotes low cable rates and enhances customer service among competitors.

The Firm strongly believes that local governments are the most qualified entities to ensure the proper issuance of cable Franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. Accordingly, the Firm would like to inform the Commission about the recent history of cable television franchising, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

Introduction

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting them from requiring a Franchise agreement, creates an unnecessary competitive advantage for

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

² See 47 U.S.C. §541(a)(1).

these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the local community's specific needs are met and that local customers are protected. Without the franchising process, the LFAs would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question LFAs in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the Franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these Franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.³

Furthermore, in *Union CATV v. City of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."⁴ There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

Local Franchising Authorities have an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.

The franchising process ensures that thousands of customer service complaints, in most cases are handled within 24 hours or at the most, within 72 hours. Most if not all Cities and Counties have a rapport with the cable operator to ensure that issues are resolved informally and quickly, without resorting to enforcement proceedings. Typically, Commissioners and City staff know their cable representative on a first name basis. This type of relationship is a direct result

³ See H.R. REP. NO. 98-934, at 24, *reprinted in* 1984 U.S.C.C.A.N. at 4661.

⁴ See *Union CATV v. City of Sturgis*, 1997 FED App. 0075P (6th Cir.).

of the local franchising process. It is inconceivable that a state or federally held Franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in each respective community. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

The Franchising Process

Initial Franchise

Cable service cannot be provided unless there is a cable Franchise granted by the franchising authority.⁵ “Franchise” means the *non-exclusive* right granted by the LFA to a Franchisee in a Franchise Agreement to construct, maintain and operate a Cable System to provide Cable Services under, on, and over Streets, roads and any other public ways, rights-of-ways, or easements within all or specified areas of the City or County. The City or County is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television Franchises.

The public policy is that cable television regulations should include Franchise procedures and standards which encourage the growth and development of cable systems to assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.⁶ Accordingly, an LFA may not unreasonably refuse to award a competitive cable television Franchise.⁷

A cable Franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the Franchise is approved by both parties the provisions in the Franchise agreement function as contractual obligations upon both parties.

Most if not all Cities and Counties are authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. Most Franchise agreements provide that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the City or County and its residents.

⁵ See 47 U.S.C. §541(d).

⁶ See 47 U.S.C. § 521.

⁷ See 47 U.S.C. § 541(a)(1).

Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

Florida law requires that no local government may grant a cable Franchise unless it does so after holding a public hearing in which it considers the economic impact upon private property, the public need for the Franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the Franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.⁸

While a Franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government. For example, in Florida Franchise agreements are approved by Resolution or Ordinance, which typically requires two readings and a public hearing.

The public hearing allows all of the parties, including residents, to voice their concerns, questions and comments. Typically, the public hearing is announced in a local newspaper with the highest area of circulation, for two weeks prior to the meeting. In most cases, the draft Ordinance or Franchise agreement is available for public inspection during this period. Commission meetings are usually held in the evening, so that the residents can attend and participate in the process. Following the public hearing, the Board of County Commissioners or City Council openly discusses the item that results in a vote to approve or deny.

Local Franchising/Local Oversight

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable Franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The LFA is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. Most of the Cities and Counties the Firm represents have an Ordinance provision similar to the one below:

Except to the extent required by law, a Franchisee shall, at its expense, protect, support, temporarily disconnect, relocate, or remove, any of its property when required by the County by reason of traffic conditions, public safety, Street construction, Street resurfacing or widening, change of Street grade, installation or sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of municipal or public utility improvements; provided, however, that the Franchisee shall, in all such cases, have the privilege of abandoning any property

⁸ See Fla. Stat. § 166.046(2).

in place. Franchisee shall do so at its expense to the extent other users of the rights-of-way are so responsible, consistent with applicable law.⁹

Additionally, in order to manage the rights of way for vehicles, pedestrians and utility-type providers, most Cable Ordinances requires that the cable operator keep full and complete plats, maps and records showing the exact locations of its facilities located within the public Streets, ways, and easements of the County.

Accordingly, the Commission cannot bypass a Local Franchising Authority's franchising process by considering establishing rules applicable only to telephone companies seeking to use the City or County's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable Franchise renewals to ensure that local needs are met.

Florida's Level Playing Field Statute

The public policy of the State of Florida is that cable television LFAs should grant overlapping Franchises under terms and conditions which are not more favorable or less burdensome than those of other Franchises.¹⁰ Furthermore, section 166.046(5) provides "Nothing in this section shall be construed to prevent any...city considering the approval of an additional cable service Franchise in all or any part of the area of such...city from imposing additional terms and conditions upon the granting of such Franchise as such...city shall in its sole discretion deem necessary or appropriate."

One of the major impediments to the grant of competitive franchises is the threat of being sued by the incumbent or the subsequent Grantee under the Level Playing Field Statute. For instance, if the LFA were to grant a franchise under terms and conditions more favorable or less burdensome than those of other Franchises, the LFA risks being sued by an incumbent. On the other hand, if the LFA were to grant a Franchise with terms and conditions less favorable and more burdensome, the LFA would fear being sued by the competitor. To date, potential competitive providers, including but not limited, Verizon, have refused to provide indemnification to such suits.

Cable Franchising in Florida

Competitive Cable Systems

As previously stated, the Law Firm has represented over 50 jurisdictions in the state of Florida, all of whom encourage competition. Below is an example of a typical Ordinance provision which is illustrative of a County's willingness and desire to promote competition:

A Franchise is non-exclusive and will not expressly or implicitly preclude the issuance of other Franchises to operate Cable Systems within the City, or affect

⁹ Lee County Cable Ordinance No. 01-05 ("Cable Ordinance").

¹⁰ See Fla. Stat. § 166.046(3).

the City's right to authorize use of City Streets to other persons to operate Cable Systems or for other purposes as it determines appropriate.

The Franchisee's right to use and occupy the Streets and rights-of-way shall be non-exclusive. The City reserves the right to grant a similar or other use of said Streets, or any portions thereof, to any person, including the City, at any time during the term of this Agreement consistent with Florida Statute 166.046 as in effect on the date hereof.¹¹

In the Firm's experience over the past 25 years, there has been a lot of consolidation of cable companies. Thus, there are fewer cable operators in areas such as Dade, Lee Palm Beach and St. Lucie Counties. As a result, some communities, such as Broward County on behalf of all municipalities invited competition and even issued a Request for Proposal to potential cable operators to promote competition in the County.

Reduction to the point of elimination of competition has been greatly facilitated by federal agencies including the FCC and FTC that have virtually rubber stamped approval of every merger and acquisition in the cable industry without regard to local interests.

Effective Competition

Hundreds of Petitions for Effective Competition have been filed with the Commission by the cable operators. The FCC has granted a majority of these Petitions, thus it would appear that the FCC has determined that competition does in fact exist. Furthermore, it is questionable whether the Commission has the resources to respond to the number of Petitions for Effective Competition as well as the Opposition to these Petitions. For example, in December 2004, the Cities of Hialeah, Deland and Miami filed an Opposition to Comcast's Petition for Determination of Effective Competition, and as of this date the Commission has not yet ruled on the Oppositions. The Cities have been waiting for the Commission to respond to their Opposition for over fourteen months. If the Commission takes an inordinate amount of time to consider an Opposition, how long would it take the Commission to respond to public safety, customer service and cable franchising issues Cities face every day? It appears that the Commission does not have the finances or the personnel to investigate and be adequately informed of other issues effecting franchising matters in the City.

Customer Service

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

¹¹ The City of West Palm Beach Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances ("Cable Ordinance").

Residents call City Hall and constituents expect local officials to have the power to solve the problem. It is the Firm's position, through years of experience, that the only effective tool is local franchising enforcement.

For example, the City of Jacksonville's customer service was so poor that the City was besieged with thousands of complaints. Only after the imposition of millions of dollars in fines did the cable operator respond. Ultimately, the City and the AT&T/Comcast settled for a lump sum of \$2,000,000, \$150,000 per year for use of the City in making community grants, and amendment of the Franchise agreement provisions regarding customer service. Another stipulation of the Settlement Agreement was that the City had the right to hire an independent third party Auditor, at the Franchisee's expense, to evaluate the Franchisee's compliance with the City's customer service standards set forth in the amended Ordinance. The Auditor would provide quarterly reports to the City, ensuring that the cable operator complied with the customer service standards.

Public Safety / The City of Miami

The City's engineer informed the City that there were several poles where the wires hung so low that a child could reach up and get electrocuted. The City immediately called the cable operator, whereby the cable operator brought in a crew to remedy the situation so that no one would be injured or killed. As illustrated, LFAs need and expect a timely response to protect public safety issues are handled in a timely manner. The Commission simply does not have the resources to respond to this sort of life threatening situation in a timely manner.

Public Safety / Technical/Engineering Audit – The City of West Palm Beach

Public safety is a critical issue for local government, since the failure to comply with the local Ordinance could result in lives being at risk. The City's Ordinance and Franchise agreement provide enforcement remedies, in the event the Franchisee fails to comply with all safety practices required by law in the placement, maintenance and repair of facilities in the rights of way. For example, Section 26-322 of the City of West Palm Beach's Cable Ordinance regulates the use of streets, providing that Franchisee's are required to:

- (1) Install and maintain its wires, cables, fixtures and other equipment in accordance with the requirements of the City's Building Code and Electrical Safety Ordinances and any other applicable Building or Electrical Safety Code, and in such manner that they will not interfere with any installations of the City.
- (2) Keep and maintain in a safe, suitable, substantial condition, and in good order and repair, all structures, lines, equipment, and connections in, over, under, and upon the Streets, sidewalks, alleys, and public ways or places of the City, wherever situated or located.¹²

Section 26-315 of the City of West Palm Beach's Cable Ordinance provides:

¹² The City of West Palm Beach Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances ("Cable Ordinance").

(a) Any Cable System within the City shall meet or exceed the technical standards of the FCC or other applicable federal or state technical standards, including any such standards as hereinafter may be amended or adopted. Antennas, supporting structures, and outside plant used in the Cable System shall be designed to comply with all generally accepted industry practices and standards and with all federal, state, County, City and/or utility laws, ordinances, rules and regulations.

(b) All construction, installation and maintenance shall comply with the National Electrical Safety Code, the National Electric Code, and all local codes, laws and accepted industry practices, and as hereinafter may be amended or changed.

In 2003, the City of West Palm Beach hired The Kramer Firm, Inc., an Engineering Firm to conduct a technical audit and found that the Franchisee was in violation of the Cable Ordinance and Franchise agreement related to the installation, operation and maintenance of the cable system in the City. The engineer inspected the cable plant within the boundaries of the City and found that the Franchisee (1) repeatedly failed to comply with applicable plant safety rules, including the National Electric Code and the National Electrical Safety Code and (2) had failed to take such actions as would be necessary to complete the rebuild of its System as provided in the Ordinance.

The Kramer Firm, Inc.'s inspection of the Adelphia system indicated pervasive violations of the Franchise and Ordinance. The violations described below were representative of those commonly found in Adelphia's system in the City of West Palm Beach. The Engineer noted that the violations are not the only violations observed, or the only categories of violations likely to be found by a close (months long) inspection of the plant. However, it was estimated by the Engineer that there exist ten thousand (10,000) instances of the following violations in the City.

- (a) Observed plant conditions primarily implicate violations of the National Electric Safety Code. Most notably, not exclusively, Adelphia has failed to insure that its system complies with the National Electrical Safety Code and the National Electrical Code regarding cable plant and drop minimum clearances from power on poles.
- (b) Adelphia has failed to perform required plant maintenance of its cable system endangering the public. Observed plant conditions also primarily implicate violations of the National Electric Safety Code.
- (c) Adelphia has failed to perform required overhead plant inspections as required by NESC Section 214. This finding is supported by the significant number of violations readily observed from driving through the City and merely observing the cable plant. Either Adelphia's field staff is not properly trained to detect and /or report plant safety code violations, or those reports are not being processed to resolution by the system management. In either case,

the public and Adelphia's workers are unnecessarily placed at risk of bodily injury or worse.

- (d) Adelphia's underground plant system, particularly its pedestals, is generally not maintained to insure public safety and fails to conform to the requirements of the National Electrical Safety Code and the National Electrical Code.
- (e) Adelphia has failed to perform required overhead plan inspections as required by NESC Section 313. Once again, and for the same reasons described above, the public and Adelphia's workers are unnecessarily placed at risk of bodily injury or worse.

The City of West Palm Beach sent a "Notice of Violation and Demand for Compliance" to the Franchisee pursuant to the provisions in the City's Ordinance, requiring that the Franchisee cure all of the violations, commence to cure the violations or be subject to the imposition of liquidated damages.

The Franchisee and the City ultimately fully resolved the issues. The only reason the City was able to resolve these issues was because the City had the authority to enforce its Franchise and the legal authority to consider this unsatisfactory performance by the cable operator in the pending renewal proceedings.

Technical/Engineering Audit – The City of Miami

The City of Miami, like West Palm Beach, had also conducted a technical audit of the TCI system within Miami in 1996. Based on the audit findings, the City determined that TCI was not in compliance with Ordinance provisions affecting the operation of the system. The City notified TCI that the Company was in violation of the following provisions:

- (1) Stand-by power – the majority of the backup supplies were inoperable in violation of the Ordinance;
- (2) Emergency Override – the system did not provide the required override capacity, which would allow the Mayor to override remotely the audio of all channels in retransmission of TV broadcast programming in the event of an emergency situation;
- (3) Cable Television System Installation – TCI failed to maintain all equipment in workmanlike and suitable condition and good order and failed to replace under performing equipment;
- (4) Technical standards – the work involved in maintenance and repair of the system was not being performed in a safe, thorough and reliable manner and that certain materials comprising the system required replacement;
- (5) Maintenance – All parts of the System within the City were not in good condition and repair.

The City's Ordinance provided for enforcement remedies, whereby TCI would be liable to the City for \$2,500 per day for each day the violation continued. TCI and the City ultimately resolved the issues. However, as was the case in West Palm Beach, the only reason the issues were resolved was because the City had the authority to enforce the provisions in the City's Ordinance and Franchise agreement.

PEG: Channel Capacity, Capital Support and Service to Schools & Government Buildings

A franchising authority may in its request for proposals require as part of a Franchise, and may require as part of a cable operator's proposal for a Franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.¹³ Accordingly, LFAs have the right to establish Ordinance and Franchise requirements regarding channel capacity for government and education access programming.

Channel Capacity

PEG capacity and benefits vary from one community to another. For example, the City of West Palm Beach currently has one (1) full-time government access channel. Pursuant to the Franchise agreement, the City is entitled to one additional access channel for the City's exclusive use, provided certain usage conditions are met. PEG channels are extremely important to the City and the residents of West Palm Beach.¹⁴

The City of Lake Worth, unlike West Palm Beach, has the right to an access channel pursuant to their Franchise agreement, however, the City does not have the resources to start or run a PEG channel.

Similarly, the City of Hialeah, has no PEG channel, despite the fact that channel capacity is especially important in areas with a high minority population. Hialeah has a population of approximately 240,000 people and 94% of the consumers in the City's franchise area are Hispanic or Latino. Fortunately, the City of Hialeah is currently in the renewal window, thus, the City has the opportunity to negotiate the renewal only if the City maintains franchising authority. Therefore, the City would have the opportunity to negotiate benefits such as a PEG channel and a capital grant for PEG support for equipment and facilities, consistent with the City's Ordinance.

The City of Cape Coral's Minority Issues Committee has noted that the Hispanic community has a very strong interest in having more local Hispanic programming. Mickey Rosado, a Cape Coral Council Member states, "In the past, Time Warner has not represented all of the recognized demographics of the city and there have been insufficient outlets for our locally diverse community. Furthermore, if the Federal Government takes away our franchise ability, it would impair us more at the local level."¹⁵

Capital Support

Very few local governments have the resources to purchase equipment to operate a PEG channel. Therefore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

¹³ See 47 U.S.C. § 531(b).

¹⁴ See James W. Clark's Declaration.

¹⁵ See Declaration from Mickey Rosado.

Federal law specifies that communities can only require money to be used for facilities, not operations. Consistent with federal law, the cable operator agreed to pay the City West Palm Beach a capital grant for PEG equipment, facilities and other capital requirements in the amount of \$1,190,000, acknowledging that pursuant to FCC rules, the Capital Grant could be passed through to Subscribers.

Similarly, the City of Coral Gables received a capital grant in the amount of \$2,000,000 for public, educational, or governmental access facilities within the meaning of Section 622(g)(2)(C) of the Communications Act, 47 U.S.C. § 542(g) (2) (C).

Service to Schools & Government Buildings

Local governments have been successful in requiring the local cable operators to provide installation and some level of free service to local government buildings and schools. Clearly there is no other entity, other than LFAs to identify these types of needs. Preemption of local authority in this area could have a significant negative impact of the availability of cable service and in some cases, cable modem service to such facilities, including but not limited to government offices, community centers, senior centers, libraries and schools.

The Importance of the City's Transfer Authority – exercised to ensure all subscribers receive comparable services

In addition to having the power to grant an initial franchise, federal law recognizes that local governments have renewal and transfer authority. Pursuant to FCC rules, a local franchising authority has 120 days from the date of submission of a completed FCC Form 394, and any additional information required by the Franchise Agreement or applicable state or local law, to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.¹⁶ Accordingly, franchise grants, renewals, and transfers are all legislative acts because they involve policy decisions regarding the terms and conditions of the use of the public rights of way.

In *Charter Communications, Inc. v County of Santa Cruz*, the district court concluded that local governments have the right to deny a franchise transfer by a local government where there is substantial evidence for any one sufficient reason for denial.¹⁷ Moreover, the opinion holds that where the local government's judgment was reasonable, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by a legitimate government interest.

For example, the City of Hialeah granted a Franchise to Dynamic Cablevision of Florida, Inc. in 1978 for a period of ten (10) years and provided two options to renew, each for a period of ten (10) years. In April, 1988, the Franchisee renewed the Franchise for the period from September, 1988 to September, 1998. The Franchise automatically renewed for another ten years. There were several transfers and mergers of the cable system between 1978 and 2003.

¹⁶ See 47 CFR §76.502.

¹⁷ *Charter Communications, Inc. v. Santa Cruz*, 304 F.3d 927, 2002 U.S. App. LEXIS 19631.

Specifically, Dynamic Cable was transferred to Media One of South Florida Inc./AT&T Corporation and AT&T Broadband (“AT&T”). AT&T was then transferred to AT&T Comcast Corporation. AT&T Comcast Corporation subsequently changed its name to Comcast Corporation (Comcast of South Florida I, Inc.).

One of the requirements in a transfer is that the Franchisee fulfills its obligations pursuant to the Ordinance and Franchise agreement. The City originally denied the transfer from AT&T to Comcast based upon the Franchisee’s failure to provide benefits and services comparable to those benefits and services provided by the Franchisee to adjacent communities. As a result of the City’s ability to exercise their transfer authority, the proposed Transferee agreed to revise the outdated 20-year old Ordinance, incorporating standards and obligations that more closely satisfied the needs of the City and its residents, including but not limited to, stronger customer service provisions, enforcement provisions, insurance and security provisions, state-of-the-art, I-NET, interconnection of public buildings and schools, and PEG. Accordingly, the transfer was ultimately approved by the City. Only as a result of the City’s transfer authority was the City able to obtain these benefits. Below are several provisions which were updated in the Ordinance.

“The City may grant a franchise for a period not to exceed fifteen years.” The City has the authority to limit the term for which franchises shall be granted. The Ordinance does not dictate the term for which Franchise is granted but simply provides a maximum limit. The Court in Telesat Cablevision, Inc v. The City of Riviera Beach, 773 F. Supp. 383 (September 13, 1991) held that the City of Riviera Beach’s cable ordinance, which contained a franchise term limit, to be constitutional.

“The City shall require in a franchise agreement that, prior to the franchise becoming effective, the Franchisee shall post a security fund with the City. Such fund may be in the form of a cash deposit, letter of credit, or performance bond as set forth in a franchise agreement... and to enable the City to effectively enforce compliance therewith, but in no event less than (200, 000.00).”

State-of-the-art means that level of technical performance, equipment, components and services more modern than that which has been developed and demonstrated to be generally accepted and used in the cable industry, excluding “tests” involving new products offered for one year or less. The system shall have, at a minimum, the capability of substantially similar capacity, cable products and cable services available from a system serving any other community in Miami-Dade County, Florida, owned and operated by the Franchisee, its parent, affiliates or subsidiaries as of the date of this article. The “State-of-the-art” provision was originally objected to despite the Franchisee’s pre-existing obligation under the Coral Gables Franchise, a City served by the same system. Only by the City of Hialeah’s transfer authority, did they get the cable operator to agree to provide the same service already provided to adjacent communities off of the same headend.

Customer Service standards were established in the Ordinance.

Interconnection. If required by a renewal or initial grant of a franchise and upon the City's request, a Franchisee shall interconnect public, education and government access channels programmed by the City or its lawful access users with any or all other cable systems located or serving subscribers within the City. Interconnection of systems shall be for the sole purpose of permitting interactive transmission and reception of public, government and education program.

Franchise Renewal

Similar to transfer authority, renewal authority is a critical local government function. One of the stated purposes of the Communications Act is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials where operators' past performance and proposal for future performance meet the standards established by the Communications Act."¹⁸ Once a renewal proposal has been submitted § 546(c) permits the franchising authority four months to make a decision regarding whether to grant or deny a renewal.

In circumstances where a cable franchising authority stalls or frustrates the orderly process under 47 U.S.C. § 546 to the detriment and prejudice of a cable operator, a district court has equitable power to require the franchising authority to continue to honor the original franchise agreement pending completion of the § 546 process. Finally, § 546(h) provides that judicial review is available for any "final" decision made by a franchising authority through the "informal" franchise-renewal process.

During a renewal process, LFAs are entitled to ask the Franchisee to submit proposals for how its system would be upgraded, and examine, in light of community needs, the quality of the Franchisee's service, including signal quality, response to consumer complaints, and billing practices.

The City of Hialeah is currently in the renewal window, thus, the City has the opportunity to negotiate the renewal only if the City maintains franchising authority. The City's existing Franchise commenced in 1979. There have been significant changes in technology, demographics, federal and state law since the Franchise agreement was negotiated. Therefore, the City would have the opportunity to negotiate benefits such as a PEG channel and a capital grant for PEG support for equipment and facilities, consistent with the City's Ordinance. Furthermore, outdated franchise provisions can be updated addressing the City's cable related needs considering changing technology and demographics. Finally, the City is in the best position to identify the needs of the Hispanic population. It is apparent that an LFAs renewal authority is critical. Communities that would not have the opportunity to renew their Franchises would be permanently disadvantaged, creating an unfair disparity among municipalities.

¹⁸ See 47 U.S.C. §521(5).

I-NET

Section 611 (a) of the Cable Act (47 U.S.C. 531) gives LFAs the right to require in a Franchise the provision of an Institutional Network to be designated for educational or governmental use. For example, the City of Delray Beach identified a critical need for an I-NET to, in part, provide a secure intra-governmental communications system connecting numerous government offices and facilities spread throughout the City. Adelphia, in conjunction with the Franchise renewal process, designed a system to meet the City's needs and the parties entered into contract for the I-NET as part of the Franchise renewal. Absent this authority, it is doubtful that the City would have been in a position to obtain such a favorable I-NET agreement.

Build Out

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory fashion. It is the City or the County's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, LFAs have a duty to ensure that modern communications services are offered broadly to as large a number of the residents as reasonably possible, without regard to age, race, and income or other improper service criteria.

Most if not all Franchise provisions are negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis.

Annexation

Service requirements should be set forth in a Cable Ordinance, so that all of the City or County's residents have cable service and cable-based broadband service available to them. The only way residents could benefit from these service is if these terms are negotiated into a Franchise agreement. For example, the City of West Palm Beach's Ordinance provides:

Except for Cable Systems in operation on the effective date hereof pursuant to Franchises initially granted or renewed in areas annexed by the City subsequent to said initial grant or renewal, a Franchise Agreement shall require that a Franchisee make Cable Service available to every dwelling within the City of West Palm Beach or as otherwise provided in a Franchise Agreement. If the City

annexes any new areas after the date of this Ordinance, Franchisee shall be required to provide Cable Service at standard installation rates to such areas subject to this Ordinance and any Franchise granted hereto. Notwithstanding anything to the contrary, a Franchisee shall not be required to provide Cable Service to any area already served by a franchised cable operator.

In the event a Franchisee lawfully operating in a Franchise Area that is less than the entire City desires to provide service to an area of the City already being served by a franchised cable operator, then the Franchisee wishing to expand service shall agree to construct and operate its Cable System on terms no more favorable and no less burdensome than those pursuant to which the existing operator is subject.¹⁹

State-of-the Art

A Franchise entered into ten or fifteen years ago, no longer meets the needs of a City or County since technology and demographics have likely changed. In order to ensure that a community's residents have access to current telecommunications technologies, the Firm negotiates upgrade provisions similar to the one below:

“State-of-the-Art” means that level of cable system technical performance, capacity, equipment, components and service (without reference to the content of service) equal to that which has been developed and demonstrated to be generally acceptable and used in systems of comparable size, excluding Tests, and which is technically and commercially feasible on the Franchisee's system.

Notwithstanding anything herein to the contrary, when reasonably practicable but no later than twelve (12) months after notice from the County, a Franchisee shall make such technically and commercially feasible improvements to its System as may be necessary to bring the System to the State-of-the-Art. The availability of a specific level of Cable System technical performance, capacity, equipment, components and service (without reference to the content of service) on any Cable System owned or operated by the Franchisee, its parents, affiliates or subsidiaries serving a community in the State of Florida shall create a presumption of technical and commercial feasibility, provided, however, the Franchisee may make a showing to the contrary which, if sufficient, may overcome the presumption. Such showing shall be made to the Board, which shall determine whether a showing of competent and substantial evidence sufficient to overcome the presumption has been made, subject to a challenge to such determination in an appropriate legal proceeding. The County may grant extensions of the time within which a Franchisee must comply with the obligations set forth herein, to accommodate the process to be afforded a Franchisee hereunder, for good cause shown (including evidence that the Franchisee has commenced necessary

¹⁹ The City of West Palm Beach Cable Television Ordinance, codified at Chapter 78, Article IX of the City Code of Ordinances (“Cable Ordinance”).

measures to comply with the obligations herein), but in no event to exceed twelve (12) months.

Any Cable System that commences construction, including but not limited to initial construction, rebuild, upgrade, or reconstruction or is granted a Franchise or renewal after the effective date of this Ordinance shall have a minimum capacity of at least 850 MHZ providing no less than seventy-eight (78) video channels available for immediate use. A Franchise Agreement may provide for a larger minimum channel capacity requirement.

Absent a state-of-the-art obligation, such as that referenced above, local communities could easily find themselves with out of date, technically inferior systems. Unfortunately, absent such a franchise obligation, the areas that would be most susceptible are the very areas that need modern systems to support their economic development.

Insurance and Security/Bonding Requirements

A City or County has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy.

Franchise Fees

With respect to payments by a Franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax (“CST”) Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television Franchise fees.²⁰

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior Franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

Enforcement Mechanisms

Enforcement mechanisms ensure that the cable operator abides by its Franchise agreement. In addition to any other remedies available at law or equity, the City or County may apply a remedy in the event a Franchisee violates the Ordinance or its Franchise agreement, applicable state, federal or local law. For example, a community may revoke a Franchise or impose liquidated damages on a per-diem, per-incident, or other measure of violation, as set forth in an Ordinance or in a Franchise Agreement. Payment of liquidated damages by the Franchisee does not relieve the Franchisee of its obligation to comply with the Franchise

²⁰ See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

agreement and the requirements of the Ordinance. A City or County also has the right to seek legal or equitable relief from any court of competent jurisdiction.

In determining which remedy or remedies are appropriate, a City or County typically take into consideration the nature of the violation, the person or persons bearing the impact of the violation, the nature of the remedy required in order to prevent further violations, and other matters the LFA determines are appropriate to the public interest.

Enforcement remedies typically provide that the Franchisee shall be obligated to cure, or take all reasonably practicable steps to cure, any violation of the Ordinance or Franchise agreement within a specified period of time after receipt of notice from the LFA. If the alleged violation is not cured or the Franchisee has not taken all reasonable and practicable steps to commence to cure within the specified period of time, the LFA may exercise all rights and remedies available pursuant to the Ordinance, the Franchise agreement or applicable law.

As previously stated, neither the State nor the Commission has the staff or the budget to respond to violations in a timely manner. In reality, City Hall or the County gets the telephone calls from the local residents, not the FCC. LFAs need and expect a timely response to protect public safety and to ensure local service issues are handled in a timely manner.

Responses/Comments to the Notice of Proposed Rulemaking

The Commission does not have the legal authority to issue rules which preempt LFAs authority.

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive Franchise. The County respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule which interfere with the County's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.²¹

It was the intent of the Cable Act to "preserve the critical role of municipal governments in the Franchise process, while providing appropriate deregulation in certain respects... [and that] the Franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable

²¹ See 47 U.S.C. § 556(a)&(b).

system to meet those needs.”²² Moreover, Congress provided that where LFAs treated Franchisees unreasonably, Franchisees had the right to seek judicial relief.²³ Congress did not authorize the Commission to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local Franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress’ express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

The local franchising process is not unreasonably causing refusals of competitive Franchise grants.

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive “triple play” (voice, Internet and video) to cable operators’ triple play. These providers want to circumvent the Cable Act’s local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.²⁴ However, in order to offer the video component, LFAs require a Franchise agreement. In fact, a number of years ago, BellSouth had obtained a number of cable Franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable Franchises.

For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television Franchise authority. Verizon argues that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television Franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable Franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video Franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains Franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video Franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the Franchise agreement is negotiated and finalized.

²² See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

²³ See 47 U.S.C. § 555(a).

²⁴ See Fla. Stat. §337.401.

Build-Out Requirements and Red-Lining

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

The County's response to Verizon's arguments

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a Franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

Verizon also argues that that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale. However, it is evident that the County's franchising process, with Adelphia illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the County and part of that process was the County's willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community.

Conclusion

The Firm disagrees with the Commission's tentative conclusion that the FCC has the authority to ensure that LFAs not "unreasonably refuse" to award competitive Franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the Firm opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

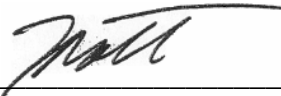
Finally, the Firm agrees with the Commission's tentative conclusion, that it is not unreasonable for an LFA, in awarding a Franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the Franchise area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The Firm is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the County's specific needs are met and that local customers are protected.

In light of the foregoing, the Law Firm of Leibowitz & Associates respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 13th day of February, 2006

Leibowitz & Associates, P.A.



By: Matthew L. Leibowitz
Ila L. Feld & Eleni Pantaridis
Leibowitz & Associates, P.A.
One S.E. Third Avenue, Ste. 1450
Miami, FL 33131

cc: NATOA, info@natoa.org
John Norton, John.Norton@fcc.gov
Andrew Long, Andrew.Long@fcc.gov